

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN BERES,

Plaintiff,

v.

MATTHEW KATES, Secretary,
California Department of
Corrections, et al.,

Defendants.

No. C 08-4683 MMC (PR)

**ORDER SETTING BRIEFING
SCHEDULE FOR FILING OF
DISPOSITIVE MOTION**

On October 9, 2008, plaintiff, a California prisoner proceeding pro se, filed the above-titled civil rights action under 42 U.S.C. § 1983. In its April 6, 2009 Order of Service, the Court directed defendants to file, within 90 days thereof, a motion for summary judgment or other dispositive motion, or, alternatively, to advise the Court that the case was not appropriate for summary adjudication. Thereafter, on October 22, 2009, defendants filed an answer. To date, defendants have not filed a motion for summary judgment or any other dispositive motion, nor have they informed the Court of their determination that the case cannot be resolved thereby.

Accordingly, the Court hereby orders as follows:

1. Within **ninety (90)** days of the date this order is filed, defendants shall file a motion for summary judgment or other dispositive motion with respect to the claim found to be cognizable in the Order of Service. **If defendants are of the opinion that this case cannot be resolved by summary judgment or other dispositive motion, defendants shall so inform the Court prior to the date such motion is due.**

1 a. If defendants elect to file a motion to dismiss on the grounds plaintiff failed
 2 to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),
 3 defendants shall do so in an unenumerated Rule 12(b) motion pursuant to Wyatt v. Terhune,
 4 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v. Terhune, 540 U.S. 810
 5 (2003).

6 b. Any motion for summary judgment shall be supported by adequate factual
 7 documentation and shall conform in all respects to Rule 56 of the Federal Rules of Civil
 8 Procedure. **Defendants are advised that summary judgment cannot be granted, nor**
 9 **qualified immunity found, if material facts are in dispute.**

10 2. Plaintiff's opposition to the dispositive motion shall be filed with the Court and
 11 served on defendants no later than **thirty (30)** days from the date defendants' motion is filed.

12 a. In the event defendants file an unenumerated motion to dismiss under Rule
 13 12(b), plaintiff is hereby cautioned as follows:¹

14 The defendants have made a motion to dismiss pursuant to Rule 12(b) of
 15 the Federal Rules of Civil Procedure, on the ground you have not exhausted
 16 your administrative remedies. The motion will, if granted, result in the
 17 dismissal of your case. When a party you are suing makes a motion to dismiss
 18 for failure to exhaust, and that motion is properly supported by declarations (or
 19 other sworn testimony) and/or documents, you may not simply rely on what
 20 your complaint says. Instead, you must set out specific facts in declarations,
 21 depositions, answers to interrogatories, or documents, that contradict the facts
 22 shown in the defendant's declarations and documents and show that you have
 23 in fact exhausted your claims. If you do not submit your own evidence in
 24 opposition, the motion to dismiss, if appropriate, may be granted and the case
 25 dismissed.

26 b. In the event defendants file a motion for summary judgment, the Ninth
 27 Circuit has held that the following notice should be given to plaintiffs:

28 The defendants have made a motion for summary judgment by which
 they seek to have your case dismissed. A motion for summary judgment under
 Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.
 Rule 56 tells you what you must do in order to oppose a motion for
 summary judgment. Generally, summary judgment must be granted when there
 is no genuine issue of material fact--that is, if there is no real dispute about any
 fact that would affect the result of your case, the party who asked for summary

¹The following notice is adapted from the summary judgment notice to be given to pro
 se prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc).
 See Wyatt v. Terhune, 315 F.3d at 1120 n.14.

judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendants' declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted in favor of defendants, your case will be dismissed and there will be no trial.

See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (holding party opposing summary judgment must come forward with evidence showing triable issues of material fact on every essential element of his claim). Plaintiff is cautioned that failure to file an opposition to defendants' motion for summary judgment may be deemed to be a consent by plaintiff to the granting of the motion, and granting of judgment against plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

3. Defendants shall file a reply brief no later than **fifteen (15)** days after plaintiff's opposition is filed.

4. The motion shall be deemed submitted as of the date the reply brief is due. No hearing will be held on the motion unless the Court so orders at a later date.

5. All communications by plaintiff with the Court must be served on defendants, or defendants' counsel once counsel has been designated, by mailing a true copy of the document to defendants or defendants' counsel.

6. Discovery may be taken in accordance with the Federal Rules of Civil Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16-1 is required before the parties may conduct discovery.

7. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court informed of any change of address and must comply with the court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

IT IS SO ORDERED.

Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge